

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 LESTER and BETTY KRUEGER and
4 HAROLD and MELANIE MOORE,

5 Petitioners,

6 v.

7 MASON COUNTY and STEVE LOVE,

8 Respondents.
9

SHB NO. 05-024

ORDER DISMISSING APPEAL

10 This is an appeal of a September 2, 2005 Mason County (County) decision approving a
11 shoreline substantial development permit (SDP) and the associated SEPA determination for
12 Respondent Steve Love's (Respondent) proposed pier, ramp, and float structure (PRF) on Hood
13 Canal in Belfair, Washington. The County issued a mitigated determination of non-significance
14 (MDNS) for the proposed project on July 7, 2005. The matter is now before the Pollution
15 Control Hearings Board (Board) on Respondent's Motion to Dismiss.¹ Attorney David S. Mann
16 represented Petitioners Lester and Betty Krueger and Harold and Melanie Moore (Petitioners).
17 Deputy Prosecuting Attorney T.J. Martin represented the County. Respondent appeared *pro se*.
18 The Board consists of Bill Lynch, Chair, and Kathleen D. Mix, Mary Alyce Burleigh, Kevin
19
20

21 ¹ Respondent Love also filed a "Motion to Exclude" which the Board has treated as essentially adjunct to the Motion to Dismiss. Petitioners have also treated it as such, and so the two motions will be addressed simultaneously.

1 Ranker, and Judy Wilson, members. This Motion to Dismiss/Motion to Exclude was decided on
2 the written record, consisting of:

- 3 1. Respondent Steve Love's Motion to Dismiss with exhibits;
- 4 2. Appellant's Opposition to Motion to Exclude and Motion to Dismiss with exhibit;
5 and
- 6 3. Respondent Steve Love's Response to Appellant's Opposition with exhibits.

7 **BACKGROUND**

8 The basis for the Petitioners' challenge to the County's approval and the MDNS for the
9 proposed PRF on Hood Canal is their assertion that the County treated the PRF as a residential
10 use structure, and failed to consider environmental impacts that would be associated with
11 commercial uses. The property that is the site of the proposed PRF is approximately 80 feet
12 wide and is bisected by the State Route (SR) 106 highway. Respondent's existing primary
13 residence, a carport, storage shed, and other miscellaneous smaller buildings are located on the
14 landward side of SR 106. On the waterward side, where the PRF is proposed, there are no
15 buildings. It is a beach area, similar to a small cove, with existing bulkheads and other PRF's to
16 the east and west on both neighboring properties. The general vicinity along the south shore of
17 Hood Canal is characterized by clustered residential development. Waterfront residences are
18 immediately east and west of the project site, each with an existing legal non-conforming PRF,
19 significantly larger than the Respondent's proposed PRF. (Mason County Hearing Examiner
20 Findings of Fact 3 and 4; Respondent's Motion to Exclude, Items 1, 2 and 6 (photograph of
21 shoreline).

1 In making its decision on Respondent's application for a residential use PRF, the County
2 did not include in its consideration the fact that Respondent currently operates a previously
3 permitted boat repair business on the portion of his property lying directly across SR 106 from
4 the location of the proposed PRF. Petitioners argue that Respondent's commercial use on the
5 other portion of his property should have been taken into account in the SEPA determination.
6 They argue that the fact that commercial uses were not factored in resulted in the County not
7 considering all the environmental factors and the significant impacts of the proposal. Petitioners
8 anticipate that Respondent's PRF will actually be used for commercial purposes. They claim
9 that the environmental checklist was inaccurate and incomplete as to such factors as traffic,
10 parking needs and noise impacts and, as a result, these alleged impacts were not sufficiently
11 addressed. Petitioners also assert that the boat repair business is not a water dependent use.
12 They argue that Respondent should have been required to obtain a shoreline conditional use
13 permit because the proposed PRF will really be accessory to the existing boat repair business for
14 which Respondent was required to obtain a conditional use permit.

15 The County issued a permit to Respondent in 1994 for commercial operation of a boat
16 repair business on the portion of Respondent's property lying across SR 106 from the proposed
17 residential use PRF. The 1994 commercial permit allowed the operation of the business as a
18 cottage industry on his primary residence, landward of SR 106. It allowed construction of a
19 thirty by forty-five foot metal building. Since that time, Respondent's business has been a
20 source of neighborhood concern due to noise, traffic, and parking problems.

1 Respondent denies that the PRF will be used to support his business. In his Joint Aquatic
2 Resources Permit Application (JARPA), Respondent stated that his PRF would be used for
3 “easier water access for recreational opportunities,” for private recreational access to Hood
4 Canal. He stated that it would be located 20 feet from the eastern property line and
5 approximately 55 feet from the western property line and approximately 80 feet from a
6 neighboring PRF to the west. (JARPA, Mason County Staff Report, Respondent’s Motion to
7 Dismiss, Items 1, 2 and 3.) Respondent denies that his proposed 100-foot PRF is for commercial
8 purposes or that it will serve his commercial enterprise and points out that he specifically
9 requested a permit for residential recreational purposes only. He argues that all of the issues
10 suggested for decision in this case relate to Petitioners’ “erroneous assumption” that the PRF will
11 be used to support his boat repair business across SR 106, an assumption Respondent insists is
12 incorrect and speculative. He asserts that he and his family use the beach portion of his property
13 upon which the PRF is to be located exclusively for their personal enjoyment of Hood Canal.
14 Respondent argues that Petitioners’ assertions that certain impacts should have been considered,
15 such as parking, access, traffic flow, noise impacts, fuel and oil spills, or that the boat repair
16 business is a non-water dependent accessory to a commercial development, are not appropriate
17 because such alleged impacts would all relate to an expanded commercial use, which he denies is
18 planned and that has been specifically prohibited.

19 Therefore, Respondent moves to dismiss Petitioner’s appeal because it entirely rests upon
20 an assumption about a future that has no support in the record. He states that the County
21

1 properly issued the SDP that he applied for, that no other permit is required, and that the SDP
2 was adequately conditioned to prevent commercial uses.

3 Mason County's SDP specifically precludes commercial use of Respondent's proposed
4 PRF. The County Hearing Examiner approved the proposed PRF on the condition that it be used
5 only for its stated purpose and not for commercial purposes. The Hearing Examiner concluded
6 that the proposed PRF would be compatible with adjacent recreational and residential land uses.
7 The Examiner considered potential impacts of the proposed PRF in light of the "extensive
8 amount of other piers and docks in the area," and he concluded that "...the addition of this
9 proposed pier and dock should not have any material impact upon recreational boats and
10 fishermen due to any impairment of navigation. This particular shoreline, as shown in [a
11 photograph] is a stretch that has similar pier, ramp and float structures in sight to the east and
12 west." (Hearing Examiner Conclusion of Law Nos. 4, 5, and 6, Respondent's Motion to Exclude
13 Item 4.)

14 The Hearing Examiner's final Finding of Fact addressed potential adverse impacts. It
15 recognized the concern that had been raised in the hearing that some people would use the
16 proposed dock to access the Respondent's business to purchase items such as spark plugs and oil.
17 The Hearing Examiner pointed to practical limitations at the site that make such attempted
18 commercial uses unlikely. These limitations include a generally insufficient tide to
19 accommodate regular ingress and egress of boats and the fact that the Respondent conducts all
20 boat repairs in dry dock and there would be no ramp in the vicinity of the PRF to move boats
21 from it to the boat repair business. The Hearing Examiner accepted the Respondent's un-refuted

1 testimony that he does not do any repair of boats while they are still in the water. To further
2 limit any opportunity for commercial uses to occur, the Examiner specifically conditioned the
3 permit “to prohibit any commercial use of the dock and place signs on the dock that state
4 ‘Private Dock’ and ‘No Trespassing’ ”. The Hearing Examiner incorporated all sixteen
5 conditions that had been recommended by the Mason County Planning Department staff into the
6 permit. These conditions included Condition No. 16:

7 The use of the pier-ramp-float is for personal recreational use only. Any
8 commercial activity shall be in violation of this substantial development permit
9 and would require a Conditional Use Permit under the Mason County Shoreline
10 Master Program.

11 Mason County Staff Report, July 28, 2005, Respondent’s Motion to Exclude Item 2.

12 To further ensure that the PRF will not be used for commercial purposes, the Hearing
13 Examiner applied three specially designed conditions:

- 14 (1) The applicant shall affix at least one sign to the pier/ram/float structure that is visible
15 to approaching boat traffic (as determined by staff) that provides at least the
16 following: “No Trespassing” and “Private Dock”. Staff may allow deviations to
17 these statements to the extent that sign size limitations and availability of premade
18 signs makes these statements impractical. The sign(s) shall remain visible and legible
19 to approaching boat traffic for as long as a boat business is operated on the
20 applicant’s property.
- 21 (2) The property owner shall not engage in any boat repair activity on the dock except for
 repairs of the property owner’s boat(s).
- (3) The surface of all floating structures shall be a minimum of eight inches above the
 surface of the water.

 Regardless of these conditions, Petitioners do not accept the assurances from the
Respondent and from the County that the PRF will be restricted to residential uses. They argue

1 summary judgment proceeding is one that will affect the outcome under the governing law.
2 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
3 and reasonable inferences must be construed in favor of the nonmoving party as they have been
4 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

5 The trier of fact must construe the evidence and consider the material facts and all
6 reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee*
7 *v. Gustafson*, 64 Wn.App. 128, 822 P.2d 1257 (1992). The party moving for summary judgment
8 must show that there are no genuine issues of material fact and the moving party is entitled to
9 judgment as a matter of law. *Magula v. Benton Franklin Title Co. Inc.*, 131 Wn.2d 171, 182, 930
10 P.2d 307 (1997). If the moving party satisfies its burden, then the non-moving party must
11 present evidence demonstrating material facts are in dispute. *Atherton Condo Apartment-*
12 *Owners Ass'n. Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
13 *Recons. Denied* (1991). A material fact in a summary judgment proceeding is one that will
14 affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d
15 1207 (1992). The nonmoving party may not oppose a motion for summary judgment by nakedly
16 asserting that there are unresolved factual questions. *Bates v. Grace United Methodist Church*,
17 12 Wn.App. 111, 115, 529 P.2d 466 (1974). It is well settled that a nonmoving party in a
18 summary judgment may not rely on speculation or argumentative assertions that unresolved
19 factual issues remain. *Seven Gables Corporation v. MGM/UA Entertainment Co.*, 106 Wn.2d 1,
20 721 P.2d 1 (1986).

1 Petitioners ask the Board to impose conditions that guarantee no commercial use,
2 suggesting that the Respondent be required to post a bond and be prohibited from applying for
3 conversion to commercial use. There is no basis in the record to justify a bonding requirement
4 and no clear authority for the Board to do so. Such draconian conditioning ignores the
5 availability of other remedies to complaining neighbors should the property be commercially
6 used in contravention to conditions imposed by the County. Such remedies include a County
7 code enforcement action and the hearing and public notice process that would be involved in any
8 future commercial use request.

9 Petitioners' suggestion that the Examiner should have required a boundary survey is
10 another request that an unreasonable burden be placed upon Respondent. There appears to be no
11 doubt about where the proposed PRF will be located on Respondent's property. Respondent
12 submitted an approval letter from the Army Corps of Engineers. It includes a detailed placement
13 drawing locating the PRF in relation to the property lines. At its closest, the PRF is located
14 eighty feet from a neighboring PRF, and well within the indicated property lines waterward of
15 SR 106 on Respondent's property. (Respondent's Motion to Exclude, Item 2.) Respondent's
16 permit allows for construction of the PRF only on Respondent's property. Should it somehow be
17 placed elsewhere, Petitioners always have the right to seek a remedy in Superior Court, which
18 has jurisdiction over real property disputes. Petitioners make lengthy argument concerning the
19 application of Mason County's requirements for shoreline conditional use permits. These are
20 inapplicable to this case.

1 Nothing in the record supports Petitioner's contention that the planned use of the
2 proposed PRF is commercial in nature.² The County has specifically prohibited the PRF's use
3 for commercial purposes. This absolute prohibition has been reinforced by special conditions
4 that place practical limits on the structure to prevent its use for commercial purposes. If the PRF
5 is ever used for commercial purposes, it would be the subject of County code enforcement efforts
6 that, if necessary, could be initiated by Petitioners. A nonmoving party in a summary judgment
7 may not rely on speculation and argumentative assertions that unresolved factual issues remain.
8 Rather, the nonmoving party must set forth specific facts that sufficiently rebut the moving
9 party's contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables*
10 *Corporation v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). That has
11 simply not happened in this case. Petitioners rely solely upon conjecture arising from their
12 concerns about problems and permit violations that have yet to happen and may well never
13 happen. If they do, remedies exist in Mason County.

14 If reasonable persons could reach but one conclusion, summary judgment is appropriate.
15 *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Board finds the reasonable
16 conclusion here to be that Mason County properly addressed the permit application that was
17 submitted and considered the facts in the record and the concerns of opponents of this PRF
18 proposal. The County properly applied conditions that left no doubt as to the requirement that no

21 ² In this case, although the motions and Response are not accompanied by affidavits or declarations from either party, both Respondent and Petitioners present and address documents from both sides out of the record at the County level connection with these motions in support of their arguments. The parties make no objections to use of the record documents and do not raise any issue as to their authenticity. Therefore the Board accepts the record documents presented as reliable.

1 commercial use was allowed of Respondent's PRF. The County properly applied the provisions
2 of its Shoreline Master Program that applied to Respondent's Shoreline SDP application for a
3 PRF structure to be used solely for residential purposes. Respondent has asserted over and over
4 that he does not intend to use the PRF to support his business and that his neighbors need have
5 no concern about that. Petitioners have offered no evidence to support their contention
6 otherwise. Speculation, conjecture, and fear of the future are insufficient to defeat summary
7 judgment and they are insufficient to defeat Respondent's Motions to Dismiss and to Exclude.
8 Having so found, the Board enters the following

9 **ORDER**

10 Respondent Steve Love's Motion to Dismiss is GRANTED.

11 SO ORDERED this 9th day of February 2006.

12 **SHORELINES HEARINGS BOARD**

13 WILLIAM H. LYNCH, Chair

14 KATHLEEN D. MIX, Member

15 MARY ALYCE BURLEIGH, Member

16 KEVIN RANKER, Member

17 JUDY WILSON, Member

18 Cassandra Noble, Presiding
19 Administrative Appeals Judge
20
21